(1)
Supreme Court, U.S.
FILED
97 • 403 SEP - 2 1997
No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DANIEL JOHNSON, ET AL.,

Petitioners,

v.

VICTOR RODRIGUEZ, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS M. BECKER
Attorney for Petitioner
GRAY & BECKER, P.C.
900 West Avenue
Austin, Texas 78701
(512) 482-0061

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

62 pp

QUESTIONS PRESENTED

1. Whether denial of parole based in whole or in part upon the exercise of inmates' right of access to the courts is constitutionally prohibited.

2. Whether the actual injury requirement of *Lewis v. Casey* for denial of physical access to the courts is the appropriate constitutional standard for claims of retaliation for the exercise of the right of access to the courts.

3. Whether substantive due process or equal protection principles prohibit parole decisions based upon inaccurate, biased, or demonstrably false information.

LIST OF ALL PARTIES

Petitioners: Daniel Johnson, Individually and on Behalf of all Present and Future Inmates of the Texas Department of Criminal Justice-Institutional Division

Respondents: Members of the Texas Board of Pardons and Paroles: Victor Rodriguez, Chair; Irma Cauley; Bennie Elmore; John Escobedo; Brendolyn Rogers-Gardner; Gerald Garrett; Donna Gilbert; Mae J. Jackson; Daniel Lang; Mary Leal; Winona Miles; Thomas W. Moss; Paul Prejean; Gilbert Rodriguez; Albert Sanchez; Terry Schorrenberg; Cynthia Tauss; and W.G. (Billy) Walker

Members of the Texas Board of Criminal Justice: Allan B. Polunsky, Chair; Ellen J. Halbert; Joshua W. Allen, Sr.; John David Granz; Carol S. Vance; John R. Ward; R. H. (Rufus) Duncan, Sr.; Nancy Patton; and Carole S. Young

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

THE OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

ARGUMENT 4

I. THE COURT BELOW ERRED IN HOLDING THAT TO MAKE A RETALIATION CLAIMING AN INMATE MUST SHOW THAT HE WAS DENIED PAROLE SOLELY BECAUSE THE INMATE SOUGHT ACCESS TO THE COURTS 4

II. THE COURT BELOW ERRED IN HOLDING THAT SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION PRINCIPLES DO NOT PRECLUDE ARBITRARY AND CAPRICIOUS PAROLE DECISIONS 8

TABLE OF AUTHORITIES

Page

CASES:

Burkette v. Love, 89 F.3d 135 (3rd Cir. 1996)..... 11

Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986)..... 7

Block v. Potter, 631 F.2d 233 (3rd Cir. 1980)..... 11

Cain v. Lane, 857 F.2d 1139 (7th Cir. 1988)..... 7

Clark v. Georgia Pardons and Parole Board, 915 F.2d 636 (11th Cir. 1990)..... 7

Franco v. Kelly, 854 F.2d 584 (2nd Cir. 1988)..... 6

Hershberger v. Scaletta, 33 F.3d 955 (8th Cir. 1994)..... 7

Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987)..... 6

Hudspeth v. Figgins, 584 F.2d 1345 (4th Cir. 1978)..... 6

Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997)..1, 10

Johnson v. Texas Department of Criminal Justice, 910 F.Supp. 1208 (W.D.Tex. 1995).....5, 8, 9, 11

Kent v. United States, 383 U.S. 541 (1966)..... 8

Lewis v. Casey, ___ U.S. ___ 116 S.Ct. 2174 (1996)..... 3

Madewell v. Roberts, 909 F.2d 1203 (8th Cir. 1990)..... 7

Monroe v. Thigpen, 932 F.2d 1437 (11th Cir. 1991)....10, 11

Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989)..... 7

Perry v. Sindermann, 408 U.S. 593 (1972)..... 9

Shabazz v. Askins, 980 F.2d 1333 (10th Cir. 1992)..... 7

TABLE OF AUTHORITIES – Continued

Page

CASES:

Thomas v. Sellers, 691 F.2d 487 (11th Cir. 1982)..... 10

Woods v. Edwards, 51 F.3d 577 (5th Cir. 1995)..... 7

Wright v. Newson, 795 F.2d 964 (11th Cir. 1986)..... 7

Zilich v. Longo, 34 F.3d 359 (6th Cir. 1994)..... 5

STATUTES:

28 U.S.C. §1254(1) 1

42 U.S.C. §1983..... 1, 2, 7

Tex. Code Crim. Proc. Ann. art. 42.18, §18 ..... 2, 9, 12

OTHER:

14th Amendment, United States Constitution.....1, 8

THE OPINION BELOW

The opinion of the court below is published as *Johnson v. Rodriguez*, 110 F. 3d 299 (5th Cir. 1997).

STATEMENT OF JURISDICTION

The decision of the court below was announced on April 23, 1997. Motion for rehearing was denied June 2, 1997. This petition for writ of certiorari is filed within 90 days of the denial of motion for rehearing. This Court has jurisdiction to review the decision of the court below by writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides, in part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

42 U.S.C. §1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Tex. Code Crim. Proc. Ann. art 42.18 §18, provides, in part:

> . . . [A]ll information, including victim protest letters or other correspondence [and] victim impact statements . . . obtained and maintained in connection with inmates of the institutional division subject to parole . . . is confidential and privileged . . .

STATEMENT OF THE CASE

A class action was certified by the trial court in 1992, consisting of all present and future inmates in the State of Texas who are or may in the future be eligible for parole. The §1983 civil rights action sought prospective injunctive relief. After trial to the court, injunctive relief was granted as to two issues: that the Texas Board of Pardons and Paroles is prohibited from retaliation against inmates who engage in litigation activity, commonly known as "writ writers," and that the parole board's practice of denying parole due to undisclosed letters with demonstrably false or biased allegations violates the substantive due process and equal protection clauses.

The case was appealed to the United States Court of Appeals for the Fifth Circuit. By its opinion issued April 23, 1997, the Fifth Circuit reversed and remanded the issue of retaliation against writ writers to the trial court

for reconsideration and/or further proceeding in accordance with the Fifth Circuit opinion and reversed the trial court as to the protest letter issue while acknowledging that its decision conflicts with a decision of the Eleventh Circuit. Rehearing and rehearing en banc were denied. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The court below erred in holding that denial of parole, partly based on exercise of an inmate's right of access to the courts, is constitutionally permissible.

2. There is a conflict between the Fifth Circuit and the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits as to whether the threat of retaliation for the exercise of a constitutional right is sufficient to obtain relief.

3. The court below erred in applying the actual injury requirement of *Lewis v. Casey* to this retaliation claim.

4. There is a conflict between the Fifth Circuit and the Third and Eleventh Circuits as to whether the Constitution prohibits the use of demonstrably false or inaccurate information in reaching parole determinations.

ARGUMENT

I.

THE COURT BELOW ERRED IN HOLDING THAT TO MAKE A RETALIATION CLAIMING AN INMATE MUST SHOW THAT HE WAS DENIED PAROLE SOLELY BECAUSE THE INMATE SOUGHT ACCESS TO THE COURTS.

The Fifth Circuit Court of Appeals reversed the trial court's decision that the inmate class members who exercise their right of access to the courts are entitled to injunctive relief because the parole board members retaliate against those inmates for their involvement in litigation activities. In doing so, the Fifth Circuit opinion applied the wrong constitutional standard, and is clearly in conflict with eight other Circuit Courts of Appeal. Because this conflict in decision has the potential to affect inmates in the vast majority of states, it merits resolution by this Court.

The district court concluded that inmates who exercise their right of access to the courts are treated more harshly in the parole decision-making process than inmates who do not. Despite the State's averment that "they do not know which inmates are writ writers and do not care," the record clearly established negative comments to and about writ writers, as well as threats and harassment against writ writers by those holding the key to parole release.

One parole board member went so far as to state during the course of a news media interview prior to the trial of this case, that "Suing the Parole Board is not the way to go about getting out of prison." Plaintiffs' Trial Exhibit No. 60.

Other less direct threats included a parole board member telling an inmate that "litigation activities did not look good on [his] record," Trial Transcript 6-10-92, at 232, 237; that the "law library is a bad place to be," Trial Transcript 6-9-92, at 178; and an inmate witness being told during his parole interview referencing the inmate's participation in this action, "So, you're going to see us in Federal court, Bubba," Class Cert. Hrg. Transcript, at 431. Numerous other instances were detailed in the trial court's opinion. *Johnson v. Texas Department of Criminal Justice*, 910 F.Supp. 1208, 1213-15 nn. 14-18 (W.D.Tex. 1995).

On appeal, the Fifth Circuit failed to distinguish between denial of meaningful access to the courts claims, as opposed to claims of retaliation for the exercise of that right, holding that recovery was precluded unless it was shown that an inmate would have been paroled "but for" his litigation activities. The Fifth Circuit has applied an erroneous constitutional standard, and is in conflict with the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits as to this issue. The proper standard is that retaliation for the exercise of a fundamental constitutional right is an impermissible infringement on the right itself. Negative consideration in parole matters is every bit as much a constitutional infringement upon the right of access to the courts as would be a locked law library door.

The Sixth Circuit held in *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994) that retaliation against the exercise of a constitutional right is itself a violation of the constitutional right. A retaliation claim is actionable without a

showing that the complainant was precluded from actually filing his claim because he was denied, for example, physical access to the law library. A retaliation claim is established by the existence of retaliatory conduct itself.

> A threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts. Nor is it necessary that the prisoner succumb entirely or even partially to the threat. It is enough that the threat was intended to impose a limitation upon the prisoner's right of access to the court and was reasonably calculated to have that effect.

Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir. 1978).

The trial court found, consistent with that Fourth Circuit decision, that the treatment of inmates exercising their right of access to the courts was intended to discourage them from continuing to exercise that right, or to "chill" the exercise of the right of access. As such, that retaliatory conduct is constitutionally prohibited.

Similarly, the Second Circuit has held that the filing of false disciplinary actions against an inmate in retaliation for the inmate's cooperation in an administrative investigation of alleged inmate abuse is constitutionally prohibited, regardless of the procedural safeguards provided in the hearing of those false accusations. *Franco v. Kelly,* 854 F.2d 584 (2nd Cir. 1988) (citing *Howland v. Kilquist,* 833 F.2d 639, 644 (7th Cir. 1987) which held "An act in retaliation for the exercise of a constitutional right is actionable under section 1983 even if the act, when taken for different reasons, would have been proper.") Retaliation against an inmate for the exercise of a constitutional right is a deprivation of that right in violation of

42 U.S.C. §1983. *Newsom v. Norris*, 888 F.2d 371, 375 (6th Cir. 1989); *Madewell v. Roberts*, 909 F.2d 1203, 1206 (8th Cir. 1990); *Wright v. Newson*, 795 F.2d 964 (11th Cir. 1986). The 8th Circuit held in *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994), in addressing whether "actual prejudice" must be shown that a "systemic denial of inmates' constitutional right of access to the courts is such a fundamental deprivation that it is an injury in itself."

A state may not bar parole in retaliation for an inmate's exercise of his constitutional rights. *Shabazz v. Askins*, 980 F.2d 1333 (10th Cir. 1992); *Clark v. Georgia Pardons and Parole Board*, 915 F.2d 636, 639 (11th Cir. 1990); *Cain v. Lane*, 857 F.2d 1139, 1145 (7th Cir. 1988) (holding that even where proceedings are not otherwise constitutionally deficient, they may be invalidated by evidence that they were retaliatory in nature). *Accord, Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986); *Newsom v. Norris*, 888 F.2d 371, 375 (6th Cir. 1989).

The opinion below is also in conflict with an earlier Fifth Circuit opinion, *Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995), which held, "It is settled that prison officials cannot act against a prisoner for availing himself of the courts and attempting to defend his constitutional rights."

The court below criticized the district court's holding because it failed to address frivolous prisoner filings – an issue never raised in the district court, but instead, for the first time in the state's reply brief filed in the court below. This untimely raised issue is a red herring because nothing in the district court's opinion is inconsistent with the

court below's insistence that frivolous prisoner filings are not constitutionally protected.

Having proved the retaliation claim, the class of writ writers was entitled to the injunctive relief ordered by the trial court. That relief included that a rule be adopted prohibiting the consideration of inmates' exercise of their right of access to the courts as being wholly irrelevant to parole decisions. *Johnson v. Texas Department of Criminal Justice*, 910 F.Supp. 1208, 1215 (W.D.Tex. 1996). The thinly veiled threats against writ writers, as well as the more blatant threats, are not constitutionally permissible. Despite the fact that much of the proof was circumstantial in nature, the trial court correctly determined that suing the parole board was not the way to get out of a Texas prison.

II.

THE COURT BELOW ERRED IN HOLDING THAT SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION PRINCIPLES DO NOT PRECLUDE ARBITRARY AND CAPRICIOUS PAROLE DECISIONS.

Contrary to the opinion below, a substantive due process or equal protection claim can be sustained in the absence of a liberty interest or a fundamental right. State action may not be arbitrary and capricious. There is a constitutional right, based upon the 5th and 14th Amendments, to be free from arbitrary state action. See generally, *Kent v. United States*, 383 U.S. 541, 553 (1966) (statute granting substantial degree of discretion does not confer a license for arbitrary action). Moreover, even in the absence of a liberty interest, "there are some reasons

upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

The trial court determined that:

> [T]he statutory scheme under which the Board can accept statements, whether written or oral, and then prevent knowledge of said statements' existence and prohibit disclosures of their contents and of the writer's or speaker's identity, violates the equal protection rights of inmates because the Board, as a rule, denies paroles to inmates who have received protest statements.

Johnson v. Texas Department of Criminal Justice, 910 F.Supp. 1208, 1228-29 (W.D. Tex. 1995).

The "statutory scheme" referred to by the trial court requires the parole board to send notices of an inmate's parole review to victims, prosecuting attorneys, and trial judges. The requisite notices invite comment, generally consisting of "protest letters." The term "protest letter" refers generally to information submitted to the parole board by trial officials, victims, and citizens who seek to persuade the parole board not to parole a particular inmate. Prior to the granting of parole, all such letters are placed in the prospective parolee's file and considered by the board. Pursuant to the parole board practice, receipt of such a letter, regardless of its content, often causes withdrawal of a favorable parole recommendation.

Texas law, Tex. Code Crim. Proc. Ann. art. 42.18 §18, as interpreted by the Texas Attorney General's office, provides that *none* of the information contained in protest letters may be communicated to the inmate. Virtually without exception, the parole board refuses to investigate

or verify any allegations contained within protest letters. Consequently, parole decisions are continually founded upon demonstrably false information, or information that is furnished by persons with hidden bias. The district court correctly held this statute unconstitutional.

The Texas statutory scheme grants the parole board wide discretion in making parole determinations. However, even such a grant of discretion cannot constitutionally allow parole decisions to be arbitrary and capricious. The court below erroneously held that Texas inmates have no substantive due process rights because there is no liberty interest in parole itself:

> It is therefore axiomatic that because Texas prisoners have no protected liberty interest in parole they cannot mount a challenge against any state parole review procedures on procedure (*or substantive*) Due Process grounds. (emphasis added)

Johnson v. Rodriguez, 110 F.3d 299, 308 (5th Cir. 1997).

This holding, as it applies to substantive due process, is contrary to well established law. The trial court concluded that the manner in which protest letters are used virtually guarantees that false information will be used in parole decisions. Decisions based on false information, by definition, are arbitrary. The inmates' right of access to the courts is violated when unreliable or demonstrably false information is used as a basis for parole decisions. *Monroe v. Thigpen*, 932 F.2d 1437 (11th Cir. 1991). A parole board may not engage in "Flagrant and unauthorized action." *Id.* at 1442, quoting *Thomas v. Sellers*, 691 F.2d 487, 489 (11th Cir. 1982). When a parole board relies upon

false information, it treats inmates arbitrarily and capriciously in violation of due process. *Id.* The Constitution bars such arbitrary and capricious action even though there exists no liberty interest to parole in Texas. Independent of such a liberty interest, inmates still have a protectable substantive due process right in fair procedures in consideration for release on parole. That interest is violated by the consideration of false information. *Monroe v. Thigpen,* at 1442.

When a parole board bases its decisions upon factors unrelated to the factors to be considered in the determination, it transgresses the legitimate bounds of its discretion. *Block v. Potter,* 631 F.2d 233, 237 (3rd Cir. 1980). Once a state decides to provide a discretionary parole system, there are constitutional limitations for making decisions even in the absence of a liberty interest. *Id.* at 235. The Third Circuit recently reaffirmed its earlier decision in *Block v. Potter,* in *Burkette v. Love,* 89 F.3d 135, 139 (3rd Cir. 1996) stating that "Curtailment of a liberty interest is not the only way that the Constitution may be violated."

The trial court concluded that the parole board based its decisions upon inaccurate and vindictive protests, protests based upon political pressure, and protests containing demonstrably false information. *Johnson v. Texas Department of Criminal Justice,* 910 F.Supp. at 1218-20, nn.36-47. Parole decisions based upon demonstrably false information violate the inmate's right to be free from arbitrary and capricious state action.

Likewise, the court below erred in finding that the withdrawal of a previously favorable recommendation to

grant parole upon the basis of undisclosed, demonstrably false allegations contained within protest letters does not violate equal protection of the law. The court below also erred in holding that the state law authorizing such practices, Tex. Code Crim. Proc. Ann. art. 42.18 §18, is constitutional.

In so holding, the court below stated that a violation of the equal protection clause can only occur when the governmental action in question classifies between two or more identifiable groups. The court below focused upon passage of the legislation as the "action in question," noting that the legislation on its face is neutral. The court below erred in not understanding that the harmful "action in question" is instead the withdrawal of a previously granted parole – an action that plainly focuses without any rational basis upon the identifiable group of inmates who have received undisclosed, demonstrably false, and biased protest letters.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DOUGLAS M. BECKER
Counsel of Record
Additional Counsel:
MONTE L. SWEARENGEN

GRAY & BECKER, P.C.
900 West Avenue
Austin, Texas 78701
(512) 482-0061
(512) 482-0924 Facsimile

WALTER C. PRENTICE
P.O. Box 160398
Austin, Texas 78716-0398
(512) 328-1313
(512) 891-9997 Facsimile

Daniel JOHNSON, Individually and on Behalf of all Present and Future Inmates of the Texas Department of Criminal Justice – Institutional Division, Plaintiff-Appellee,

v.

Victor RODRIGUEZ, in his Official Capacity as Chairman, Texas Board of Pardons and Paroles, all Present and Future Members of the Texas Board of Pardons and Paroles, in their Official Capacities; Allan B. Polunsky, in his Official Capacity as Chairman, Texas Board of Criminal Justice, and all Present and Future Members of the Texas Board of Criminal Justice in their Official Capacities, Defendants-Appellants.

Nos. 95-50879, 96-50382.

United States Court of Appeals,
Fifth Circuit.

April 23, 1997.

Prisoner brought action on his own behalf and on behalf of class of all prisoners against members of Texas Board of Pardons and Paroles and Texas Board of Criminal Justice, challenging Texas parole scheme. Following remand, 821 F.2d 1120, the United States District Court for the Western District of Texas, Stephen H. Capelle, United States Magistrate Judge, 910 F.Supp. 1208, declared certain aspects of parole scheme violative of prisoners' constitutional rights. Defendants appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) consideration of protest letters in prisoners' parole files did not violate prisoners' equal protection rights; (2)

there was no showing under retaliation theory that prisoners suffered redressable injury from consideration of prisoners' history of litigation activities; and (3) consideration of prisoners' history of litigation activities did not violate their equal protection rights.

Reversed in part, vacated in part, and remanded.

Douglas M. Becker, Roger Dale Moore, Gray & Becker, Austin, TX, for Daniel A. Johnson.

Daniel E. Maeso, Louis Victor Carrillo, Assistant Attorney General, Jacqueline Lee Haney, Assistant Attorney General, Adrian L. Young, and Ann Kraatz, Chief, Law Enforcement Defense Division, Austin, TX, for Allan B. Polunsky and Victor Rodriguez.

Robert J. Dowlut, Fairfax, VA, for National Rifle Ass'n of America, amicus curiae.

Robert Teir, Washington, DC, for American Alliance for Rights and Responsibilities, Safe Streets Coalition, National Victim Center, Citizens for Concerns of Police Survivors, Crime Victims Services Section, Mayor's Office, City of Houston, Justice For All, Justice for Surviving Victims, Inc., Mothers Against Drunk Driving, National Organization for Victim Assistance, Parents of Murdered Children, Inc., People Against Violent Crime, Texas Association Against Sexual Assault, Texans for Equal Justice and Victims Outreach, amici curiae.

Jennifer S. McGinty-Bales, Baker & Botts, Houston, TX, for Texas Council on Family Violence and Women's Advocacy Project, amicus curiae.

Robert T. Harris, Jr., Austin, TX, for American Civil Liberties Union of Texas, amicus curiae.

David L. Botsford, Austin, TX, for Texas Criminal Defense Lawyers Ass'n, amicus curiae.

Appeals from the United States District Court for the Western District of Texas.

Before GARWOOD, DAVIS and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

In this class action by Texas prisoners, defendants-appellants, the chairmen and members of the Texas Board of Pardons and Paroles and of the Texas Board of Criminal Justice, in their official capacities, appeal the judgment below declaring certain aspects of the Texas parole scheme violative of prisoners' federal constitutional rights of equal protection and access to the courts. Also appealed is the subsequent award of attorneys' fees to plaintiffs' counsel. We reverse the magistrate judge's findings of constitutional violations, vacate the award of attorneys' fees, and remand this case with instructions.

Facts and Proceedings Below

Daniel Johnson, an inmate of the Texas Department of Criminal Justice – Institutional Division (TDCJ-ID), filed this lawsuit *pro se* and *in forma pauperis* on February 26, 1985. His initial complaint, thrice amended, was dismissed by the district court upon the recommendation of a magistrate judge for failure to state a claim and to exhaust state remedies. This Court reversed and remanded, observing that Johnson's allegations raised

"suggestions of invidious, group-based discrimination and infringement of fundamental rights." *Johnson v. Pfeiffer,* 821 F.2d 1120, 1122-1123 (5th Cir.1987) (*Johnson I*). After discussing the shortcomings of his complaint, we ordered that on remand Johnson be allowed an opportunity to amend to clarify the factual and legal basis of his claims. *Id.* at 1123-1124. We expressly reserved opinion as to whether he could even state a claim, much less prove one. *Id.* at 1123.

On remand, the district court appointed counsel to assist Johnson in preparing his Fourth Amended Complaint, which was filed on September 7, 1988. This complaint asserted several purported causes of action under 42 U.S.C. § 1983, alleging, *inter alia,* that the defendants' consideration of "protest letters" and prisoners' "writ-writing" activities in the parole process infringes a panoply of federal constitutional provisions.[1] All parties consented to final adjudication by a magistrate judge, pursuant to 28 U.S.C. § 636(c).

---

[1] Johnson's complaint also included claims that a Texas sentencing statute is applied in an *ex post facto* manner, that defendants failed to set a tentative parole month and propose a program of measurable institutional progress for Texas inmates, and that defendants discriminate against non-resident inmates by considering the prior award of furloughs as a factor favoring parole even though non-resident inmates are as a practical matter unable to receive such furloughs. The first two of these claims were dismissed at the summary judgment stage and the furlough claim after trial; these dispositions have not been appealed and are now final. The portion of the judgment below finding that the Texas Board of Pardons and Paroles and the Texas Board of Criminal Justice as corporate entities enjoy Eleventh Amendment immunity has not been appealed and is also final.

On February 11, 1992, the magistrate judge, after finding that Johnson adequately represented a class comprised of all present and future inmates of the TDCJ-ID, certified this litigation as a class action limited to prospective relief only. A bench trial was held on June 9-12 and June 23-26, 1992, and July 16, 1992. On November 1, 1995, the magistrate judge issued a memorandum opinion granting Johnson and the prisoner class prospective relief on the protest letter and writ-writing claims. On December 1, 1995, the magistrate judge issued an amended memorandum opinion clarifying aspects of his prior opinion but ordering essentially the same system-wide relief.[2] *Johnson v. Texas Dept. of Criminal Justice*, 910 F.Supp. 1208 (W.D.Tex.1995) (*Johnson II*). On April 30, 1996, the magistrate judge issued another memorandum opinion and order awarding the plaintiffs attorneys' fees in the amount of $959,361.77, expenses and costs in the amount of $35,261.86, and post-judgment interest. Defendants timely appeal judgment on the merits and the award of attorneys' fees.[3]

---

[2] The magistrate judge agreed to stay aspects of his ordered relief pending appeal. This Court, after hearing oral argument, entered an order staying implementation of the remainder of the ordered relief pending our disposition of the appeal.

[3] The American Civil Liberties Union of Texas, National Rifle Association, Texas Criminal Defense Lawyers Association, Texas Council on Family Violence and Women's Advocacy Project, and a coalition of victims' rights groups have submitted briefs to this court as *amici curiae*.

Discussion

I. The Texas Parole System – an Overview

The legislative parameters of the Texas parole system are established in large measure by Texas Code of Criminal Procedure article 42.18. Under this statute, the Board of Pardons and Paroles (Board) is the exclusive authority for determining whether qualified prisoners receive parole.[4] Tex.Code Crim. Pro. art. 42.18 §§ 1, 2(1), 8(a) and (g); *Creel v. Keene*, 928 F.2d 707 (5th Cir.1991), *cert. denied*, 501 U.S. 1210, 111 S.Ct. 2809, 115 L.Ed.2d 982 (1991). *See also* Tex. Const. art. IV, § 11. Although the statute does not fetter the Board's discretion to deny parole, it does limit the situations in which parole is authorized to those where the prisoner has secured outside placement and is "able and willing to fulfill the obligations of a law-abiding citizen." Tex.Code Crim. Pro. art. 42.18 § 8(f)(5). Furthermore, a parole panel is empowered to grant parole "only for the best interest of society, not as an award of clemency," and must determine prior to paroling a prisoner that his release "will not increase the likelihood of harm to the public." *Id.* at § 8(f)(5) and (a).

---

[4] Under Texas Revised Civil Statutes Annotated article 4413(401) as of January 1, 1990, the powers, duties, obligations, property, and records of the Texas Board of Pardon and Paroles were transferred to the Texas Board of Criminal Justice. *Johnson II*, 910 F.Supp. at 1210 n. 2. As the magistrate judge noted, however, this statute was repealed in 1991 and replaced by Texas Government Code § 491.001, which designates the Board of Pardons and Paroles as a separate entity exercising the powers granted by Code of Criminal Procedure article 42.18. *Id.*

The statute also states that the Board "shall develop and implement parole guidelines" based on "the seriousness of the offense and the likelihood of favorable parole outcome." *Id.* at § 8(f)(5). "If a member of the board deviates from the parole guidelines in casting a vote on a parole decision, the member shall produce a brief written statement," to be placed in the prisoner's file, "describing the circumstances regarding the departure from the guidelines." *Id.* The Texas scheme does not, however, require that a parole panel state its reasons for denying parole, nor does it create any constitutionally protected interest in a tentative release date prior to the termination of the sentence imposed. *Gilbertson v. Texas Bd. of Pardons & Paroles*, 993 F.2d 74 (5th Cir.1993).

The Board generally executes its statutory mandate in three-member panels. The particularities of the parole review process are recited in the magistrate judge's opinion:

> "Most inmates are reviewed for parole consideration by a panel of three [members of the Board]. The first panel member often (but not always) interviews the inmate at the institution and writes a summary of the interview for inclusion in the inmate's parole file. The first panel member then 'votes the case' by indicating on the docket sheet in the file whether he or she favors release on parole. The second panel member then receives the file and votes the case without an interview. If the first two panel members disagree, the file then goes to the third member for the dispositive vote. If the first two panel members agree, the case does not go to the third member.

> If the panel votes against release on parole the inmate receives a form notice from the Board listing reasons for the unfavorable decision. If the panel votes in favor of release, the inmate is notified of that fact and is told that the decision is tentative and may be rescinded, depending upon the Board's further investigation. The inmate receives a notice known as an 'F.I.' (further investigation).
>
> At a point in time roughly contemporaneous with the panel's consideration of an inmate's case, the Board sends out notification to the persons entitled to receive notice under the statute." *Johnson II,* 910 F.Supp. at 1216.

Texas Code of Criminal Procedure article 42.18 § 8(f)(2) mandates that the parole division of the TDCJ-ID notify the victim, his or her legal guardian, or a close relative (if the victim is deceased) when the prisoner incarcerated for the victimizing offense is being considered for parole. This provision specifically allows the person notified to submit to the panel a written statement. In addition, the person notified is entitled to appear before the panel, either in person or through a representative, and voice his or her views about the offense, the prisoner, and the crime's effect on the victim.[5] Subsection 8(f)(2) also declares, however, that "[t]his subsection may not be construed to limit the number of persons who may provide written statements *for or*

---

[5] The magistrate judge noted the tension between the requirement for an oral statement before the panel and the typical panel's practice of reviewing the prisoner's file and individual member voting at separate junctures rather than at a single panel sitting.

against the release of the prisoner on parole." Finally, subsection 8(f)(2) requires that in making individual parole determinations a parole panel "consider" the "victim impact statement," a document which is developed during the prisoner's prosecution and details the effects of the crime on the victim. *See* Tex.Code Crim. Proc. art. 56.03.

Generally, the parole panel's review is guided in large part by the contents of the prisoner's parole file. Subsection 8(e) of article 42.18 directs that the prisoner's parole file include the "victim impact statement" and "*any* written comments or information provided by local trial officials or victims of the offense." Thus, relevant correspondence, pro or con, from any and all interested parties *may* be received and considered by a parole panel; correspondence from "local trial officials" and "victims" *must* be included in the prisoner's parole file, while the "victim impact statement" *must* be considered in making the ultimate parole determination. Regardless of what circumstances must be *considered* in a parole hearing, the ultimate *result* (parole or denial) is a matter left completely to the parole panel's discretion.

Subsection 8(e) also provides that the parole file contain "all pertinent information relating to the prisoner, including but not limited to," a sentencing report, the circumstances of the prisoner's offense, records of the prisoner's prior social and criminal history, physical and mental health records, and reports reflecting the prisoner's conduct, employment, and attitude while incarcerated. The statutory language makes it clear that this listing is not exhaustive, *i.e.*, information other than that mandated by subsection 8(e) may appear in a prisoner's

parole file.[6] Finally, under subsection 18(a) of article 42.18 the contents of the prisoner's parole file are confidential and privileged and therefore generally inaccessible to the prisoner.[7]

II. Protest Letters

A. The Issue

Johnson[8] challenges the statutory requirement and perceived Board custom of accepting and considering

---

[6] Testimony adduced below indicates that the parole files of some prisoners contain indications of prior litigation activity undertaken by that prisoner. Our review of the record indicates that such references are on the whole fairly generalized, *e.g.*, typifying a prisoner as "litigious" or noting that the prisoner spends time in the law library or is receiving paralegal instruction.

[7] For purposes of this litigation, limited discovery of parole file materials, typically limited to *in camera* review of those materials by the magistrate judge, was allowed. A number of those files, including that of Johnson, are part of the record we review.

[8] The magistrate judge below largely failed to distinguish between Johnson's claims in his individual capacity and those brought on behalf of the prisoner class of which he is a member. The course of our disposition on appeal does not require us to distinguish the two, and subsequent references in this opinion to "Johnson" may include both his personal claims and those brought as class representative. In the ordinary case, however, personal claims of a class representative, insofar as they parallel class claims, should be resolved first because as a general rule class injuries attributable to members of a class but not sustained by a named class representative cannot be remedied in the class action lawsuit. *Lewis v. Casey*, ___ U.S. ___, ___, 116 S.Ct. 2174, 2183, 135 L.Ed.2d 606 (1996). *See, however, County of Riverside v. McLaughlin*, 500 U.S. 44, 50-52, 111 S.Ct. 1661, 1667,

"protest letters" in the parole process. Johnson claims that these letters, which include statements from victims, prosecutors, law enforcement personnel and the general public opposing the prisoner's parole, often contain inaccurate information about the prisoner's background or the circumstances of his or her offense. Furthermore, much of the information submitted in these letters bears no relationship to the "two statutory factors," *i.e.*, the likelihood of harm to the public and the likelihood of a favorable parole outcome, which the Board is purportedly required to consider in making parole determinations. Johnson submits that the resultant system is arbitrary and capricious and treats prisoners who are the target of protest letters differently from prisoners who do not receive protest letters.

B. The Magistrate Judge's Ruling

The magistrate judge found, after reviewing testimony from both prisoners and Board members, that "inmates who receive protest letters of any kind are treated differently from inmates who do not." *Johnson II*, 910 F.Supp. at 1218. He continued by noting that the Board has no promulgated rule or articulated policy regarding the verification or consideration or effect of protest letters. *Id.* at 1218-1219. The magistrate judge further found that these letters, in some instances spawned by vindictiveness or political pressure, often

---

114 L.Ed.2d 49 (1991) (noting exception to this rule when representative's injury is mooted or otherwise nonjusticiable and the nature of the injury is inherently transitory).

contain inaccurate statements of fact or discuss unadjudicated offenses. *Id.* at 1219-1220.

The magistrate judge began his legal analysis by correctly noting that Texas law does not create a liberty interest in parole and accordingly Johnson could not state a claim for a Due Process violation based upon the Board's procedures. *Allison v. Kyle*, 66 F.3d 71 (5th Cir.1995); *Orellana v. Kyle*, 65 F.3d 29 (5th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 736, 133 L.Ed.2d 686 (1996); *Gilbertson; Creel; Williams v. Briscoe*, 641 F.2d 274 (5th Cir.), *cert. denied*, 454 U.S. 854, 102 S.Ct. 299, 70 L.Ed.2d 147 (1981). The magistrate judge did, however, accept Johnson's argument that prisoners who receive protest letters constitute a governmental classification for Equal Protection purposes. *Johnson II*, 910 F.Supp. at 1221. After conducting an extensive analysis of the legislative scheme set out by Texas Code of Criminal article 42.18, the magistrate judge observed that "almost all of the letters introduced into evidence have little or nothing to do with the two statutory factors that the Board is to consider when making parole decisions."[9] *Id.* at 1227. The magistrate judge then reached the following, sweeping conclusion:

---

[9] Although not necessary to our resolution of this case, we observe that the magistrate judge's conclusion that these "statutory factors" must be considered in each instance by individual parole panels is unsupported by the plain language of the statute. Although these factors are to be the basis under subsection 8(f)(5) of the "parole guidelines" which the Board is directed to "develop and implement," nothing in the statute suggests that a direct consideration of these factors is mandated in individual parole evaluations. Such a reading inflates the significance of these two factors to the detriment not only of the parole guidelines themselves but also of the other legislative

"The Court hereby determines that the statutory scheme under which the Board can accept statements, whether written or oral, and then prevent knowledge of said statements' existence and prohibit disclosure of their contents and of the writer's or speaker's identity, violates the equal protection rights of inmates because the Board, as a rule, denies parole to inmates who have received protest statements. The Board's sole function is to determine whether an inmate should be released on parole; its function is not to effectively re-try the case by accepting 'testimony' which was inadmissible at trial on evidentiary grounds (or would have been inadmissible had introduction been attempted) or was excluded as part of trial strategy, or by entering findings which the actual jury did not find at the inmate's trial. Evidentiary determinations are to be made in the trial court. The Board is not to consider unadjudicated offenses or offenses extraneous to the conviction for which the inmate is currently incarcerated. The Board must be bound by the conviction which the inmate received and must apply the statutory requirements regarding the time to be served on

---

limitations upon the Board's discretion, noted in our discussion in Subpart I, *supra*, and runs counter to this Circuit's repeated holdings that the Texas parole scheme does not create a legitimate expectation of release or concomitant protected liberty interest. *Compare Dace v. Mickelson*, 816 F.2d 1277 (8th Cir.1987) (*en banc*) (discussing when state law requiring release upon finding of particular facts may create a cognizable liberty interest). We emphasize that this point is noted for elucidatory purposes only: in the absence of a cognizable constitutional violation, the situation herein presented, the interpretation and implementation of the Texas parole statute is a matter for the appropriate state agencies and not this Court.

> parole for that conviction, without adding ad hoc information which results in additional time being served." *Id.* at 1228-1229 (*footnote omitted*).

The magistrate judge ordered that the Board adopt a rule providing that both written and oral protest statements "shall not be accepted or considered" by parole panels "for any purpose when making parole decisions" and "shall not be placed in the inmate's file." *Id.* at 1229.

C. Analysis

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, ___ U.S. ___, ___, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996)(citations omitted). Thus, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). Rather, as long as they do not burden a fundamental right or target a suspect class, "state agencies may pursue legitimate purposes by any means having a conceivable rational relationship to those purposes." *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1054 (5th Cir.1985) (*en banc*), *cert. denied*, 476 U.S. 1108, 106 S.Ct. 1957, 90 L.Ed.2d 365 (1986).

Even the deferential "rational basis" scrutiny which is applied to ordinary governmental classifications is not appropriate, however, when the challenged law does not create any classifications at all. As we have previously

stated, "if the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action – even if irrational – does not deny them equal protection of the laws." *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir.1988) (citation omitted). Thus, when we are confronted with a state action which does not so classify or distinguish, we need not consider whether there is a "rational basis" for that action because such state actions are not subject to Equal Protection scrutiny. *Vera v. Tue*, 73 F.3d 604, 609-610 (5th Cir.1996), *citing Brennan*, 834 F.2d at 1257.

State actors may create classifications facially, when such categorization appears in the language of legislation or regulation, *see, e.g., McGinnis v. Royster*, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L.Ed.2d 282 (1973) ("[t]he determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings"), or *de facto*, through the enforcement of a facially neutral law in a manner so as to disparately impact a discernible group. The Supreme Court has instructed us time and again, however, that disparate impact alone cannot suffice to state an Equal Protection violation; otherwise, *any* law could be challenged on Equal Protection grounds by whomever it has negatively impacted. *See Washington v. Davis*, 426 U.S. 229, 246-250, 96 S.Ct. 2040, 2051-2052, 48 L.Ed.2d 597 (1976). Thus, a party who wishes to make out an Equal Protection claim must prove "the existence of purposeful discrimination" motivating the state action which caused the complained-of injury. *McCleskey v. Kemp*, 481 U.S. 279, 292-293, 107 S.Ct. 1756,

1767, 95 L.Ed.2d 262 (1987) (citation omitted); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Davis*, 426 U.S. at 238-240, 96 S.Ct. at 2047. "Discriminatory purpose in an equal protection context implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir.1995), *quoting United States v. Galloway*, 951 F.2d 64, 65 (5th Cir.1992).

The existence of a discoverable group or classification antedating the challenged state action is a *sine qua non* for proving purposeful discrimination; it cannot tenably be maintained that the state selected a particular course of action to harm an "identifiable group" when that body did not exist until *after* the state acted. In this case, there is no basis for discerning any such pre-existing "identifiable group." The magistrate judge found that a class composed of those prisoners who received protest letters was denied equal treatment by the Texas statutes authorizing the receipt, use, and confidentiality of protest letters. The challenged laws, however, do not discriminate among prisoners; they apply to *all* prisoners *equally* and impact the prison population in a manner which the magistrate judge himself correctly described as "unpredictable." *Johnson II*, 910 F.Supp. at 1226-1227 ("[o]bviously, an inmate's potential for receiving protest letters is unpredictable"). Such a finding of "unpredictability" negates any argument that the Texas Legislature or the Board intended that the use of protest letters

evidenced by this record detrimentally impact any particular identifiable segment of the prison population.[10] Because Johnson has failed to demonstrate that the State's action targeted a discernible sub-class among the general prison population, the magistrate judge's ruling must be reversed.

Moreover, the magistrate judge, incorrectly perceiving an Equal Protection *question* before him, also failed to properly consider Texas' justification for the protest letter scheme before finding an Equal Protection *violation*. *See Bowen v. Owens*, 476 U.S. 340, 106 S.Ct. 1881, 90 L.Ed.2d 316 (1986). Under the rational basis scrutiny which the magistrate judge should have undertaken if, as he incorrectly assumed, the protest letter issue was properly resolvable under an Equal Protection analysis, it was merely necessary to determine whether "the classification at issue bears some fair relationship to a legitimate public purpose."[11] *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382,

---

[10] Nor do we find prisoners *qua* prisoners to be such a classification insofar as the parole statute is concerned. While it is evident that prisoners are a "class" within the context of the general population, *see Hilliard v. Ferguson*, 30 F.3d 649 (5th Cir.1994), there is a marked difference when the parole context is examined. Unlike laws which regulate a specific sub-group in the larger society, the relevant "general population" for parole laws *is* the prison population; unlike laws that tax, regulate, subsidize, or circumscribe, parole release provisions can never impact the ordinary citizen who has not been convicted and incarcerated.

[11] The provisions of the parole statute entitling victims or their close family members to notification and an opportunity to respond are part and parcel of Texas' proclaimed public policy of furthering the rights of victims, a legitimate and rational state

2394, 72 L.Ed.2d 786 (1982). The magistrate judge's opinion, however, dwells upon the nature of the "evidence" which the Board considers, the inability of prisoners to examine and rebut such evidence, and the possibility that false information will enter the prisoner's parole file by way of a protest letter.[12] In so doing, the magistrate judge

---

purpose. *See* Texas Constitution, Article 1, § 30. Affording such persons protection against reprisal by maintaining the confidentiality of their protests is similarly rational. Nor is it irrational for the state to avoid the expense and inconvenience of formal, adversarial type parole hearings.

[12] The magistrate judge cited *Sandin v. Conner*, ___ U.S. ___, ___, 115 S.Ct. 2293, 2302, 132 L.Ed.2d 418 (1995), for the proposition that the Board could not use written or oral statements in parole determinations unless the prisoner had the chance to review the statements and, if appropriate, rebut them. *Johnson II*, 910 F.Supp. at 1228. First, this holding of the magistrate judge, essentially a type of procedural Due Process hearing requirement, is contrary to settled precedent. *See, e.g., Jago v. Van* Curen, 454 U.S. 14, 21-22, 102 S.Ct. 31, 36, 70 L.Ed.2d 13 (1981); *Jackson v. Reese*, 608 F.2d 159, 160 (5th Cir.1979). Second, *Sandin*'s passing reference to the procedures which Hawaii affords to its state prisoners in the parole process was merely ancillary to a determination that Hawaiian prisoners had no right to procedural Due Process in the there-challenged prison disciplinary hearing, which was the only issue before the Court. *Sandin* expressed no view as to whether any character of process was constitutionally required for Hawaii parole decisions. For these reasons, as well as those reflected in our discussion of the reach of the Due Process Clause in the parole context, *infra*, the magistrate judge's statement of the law was incorrect.

The magistrate judge also found, relying upon *Cook v. Tex. Dep't of Criminal Justice Planning Dep't*, 37 F.3d 166, 168-169 (5th Cir.1994), that the Board could not consider unadjudicated offenses in parole hearings. *Johnson II*, 910 F.Supp. at 1229 n. 73. *Cook*, however, dealt with the particular circumstance of prior

conflated what should have been two distinct inquiries: 1) is the application of the laws discriminatory, a matter for the Equal Protection Clause, and 2) does the application of the laws produce a result which is unreliable, a concern which speaks to procedural Due Process.

The protections of the Due Process Clause are only invoked when State procedures which may produce erroneous or unreliable results imperil a protected liberty or property interest. *See Olim v. Wakinekona*, 461 U.S. 238, 250-251, 103 S.Ct. 1741, 1748, 75 L.Ed.2d 813 (1983); *Jago*, 454 U.S. at 16-18, 102 S.Ct. at 34; *Meachum v. Fano*, 427 U.S. 215, 223-225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Jay v. Boyd*, 351 U.S. 345, 352-361, 76 S.Ct. 919, 924-928, 100 L.Ed. 1242 (1956). It is therefore axiomatic that because Texas prisoners have no protected liberty interest in parole they cannot mount a challenge against any state parole review procedure on procedural (or substantive) Due Process grounds. *Allison; Orellana; Gilbertson; Creel. Accord, Hill v. Jackson*, 64 F.3d 163 (4th Cir.1995); *O'Kelley v. Snow*, 53 F.3d 319 (11th Cir.1995); *McCall v.*

---

convictions which this Court had previously set aside on the basis of federal constitutional violations, and stands only for the unremarkable rule that when a conviction has been thus judicially nullified a prisoner may obtain an order enjoining use of the voided conviction in a parole hearing, and might even be seen essentially as a federal court enforcing its own prior order. *See Bloodgood v. Garraghty*, 783 F.2d 470 (4th Cir.1986) (holding parole board has no duty to examine validity of prisoner's convictions); *United States v. Francischine*, 512 F.2d 827, 828 (5th Cir.) (same), *cert. denied*, 423 U.S. 931, 96 S.Ct. 284, 46 L.Ed.2d 261 (1975). In the absence of such a circumstance, there is nothing delimiting the Board's consideration of prior offenses, adjudicated or unadjudicated.

Delo, 41 F.3d 1219 (8th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2623, 132 L.Ed.2d 865 (1995); *Malek v. Haun*, 26 F.3d 1013 (10th Cir.1994); *Phillips v. Brennan*, 969 F.2d 384 (7th Cir.1992), *cert. denied*, 506 U.S. 1057, 113 S.Ct. 990, 122 L.Ed.2d 142 (1993); *Brandon v. D.C. Board of Parole*, 823 F.2d 644 (D.C.Cir.1987); *White v. Hyman*, 647 A.2d 1175 (D.C.C.A.1994); *State ex rel. Hattie v. Goldhardt*, 69 Ohio St.3d 123, 630 N.E.2d 696 (1994). Were we to allow Johnson's Equal Protection challenge in the absence of any showing of *de jure* or *de facto* governmental classification, we would be in effect endorsing, under the aegis of "Equal Protection," the general federal constitutional right to be free from arbitrary and capricious state action which our procedural Due Process precedents eschew. *Irving v. Thigpen*, 732 F.2d 1215, 1218 (5th Cir.1984) (where Mississippi parole law does not create a protected liberty interest, a prisoner "cannot maintain a section 1983 action or a *habeas* petition on the grounds that the parole board deprived him of procedural due process") (citations omitted). Johnson's allegations that the Board considers unreliable or even false information in making parole determinations, without more, simply do not assert a federal constitutional violation.[13] *Compare Dock*, 729 F.2d

---

[13] The underlying dispute on this issue is whether (and if so, to what extent) a prisoner enjoys a federal right to have accurate information in his or her parole file. *Compare Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) (Due Process violation for district court to sentence defendant based on misinformation). We recognize that the jurisprudence in some of the other circuits is somewhat inconsistent in this area. *See, e.g., Perveler v. Estelle*, 974 F.2d 1132 (9th Cir.1991) (reviewing *habeas* petitions disputing state parole results under the same administrative standard as findings of the United

at 1290 ("there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that

---

States Parole Commission). Johnson relies in large measure upon *Monroe v. Thigpen*, 932 F.2d 1437 (11th Cir.1991), in which the court found that a state parole board's admitted use of false information was arbitrary and capricious and constituted a violation of Due Process. Subsequent Eleventh Circuit precedent, while not expressly overruling *Monroe*, has noted that no Due Process rights exist for parole procedures where there is no legitimate expectation of parole. *See O'Kelley*, 53 F.3d at 321-322. Furthermore, *Monroe* itself limits the "right" which it uncovered to situations where the state admits the use of false information; a prisoner's allegations that false information was used to deny him parole is insufficient, in the absence of such an admission, to state a claim under section 1983. *Monroe*, 932 F.2d at 1442. *See James v. Robinson*, 863 F.Supp. 275 (E.D.Va.1994), *aff'd*, 45 F.3d 426 (4th Cir.1994).

Additionally, although not relied upon by Johnson, the Fourth Circuit in *Paine v. Baker*, 595 F.2d 197 (4th Cir.), *cert. denied*, 444 U.S. 925, 100 S.Ct. 263, 62 L.Ed.2d 181 (1979), developed a tripartite test to determine when "false information" should be expunged from prison records. *Monroe* discussed *Paine* in passing and concluded that language in *Paine* indicating a "due process right to be fairly considered for parole" had been invalidated by the Supreme Court's subsequent decision in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). *Monroe*, 932 F.2d at 1440-1441 n. 8. In addition, although *Paine* has not been expressly overruled, subsequent Fourth Circuit cases reflecting this Circuit's view certainly undercut any contention that the *Paine* analysis is still viable in the circuit which initially formulated it. *See, e.g., Hill*, 64 F.3d at 170-171. Those courts that continue to give lip service to *Paine* have practically emasculated it by reading its third requirement, that the information be relied upon to a constitutionally significant degree, in tandem with subsequent jurisprudence recognizing that there is no procedural Due Process protection for procedures which are unrelated to a protected liberty interest.

assure error-free determinations") (*citations omitted*). Rather, such concerns are matters for the responsible state agencies and it is to those bodies that grievances concerning parole procedures should be addressed. *Brandon*, 823 F.2d at 649.

"A violation of the equal protection clause occurs only when, *inter alia*, the governmental action in question classifies between two or more relevant persons or groups." *Vera*, 73 F.3d at 609-610. Johnson has failed to demonstrate this necessary predicate to his claim.[14] We

---

See Pruett v. Levi, 622 F.2d 256 (6th Cir.1980); *James; McCrery v. Mark*, 823 F.Supp. 288 (E.D.Penn.1993); *Goldhardt. Contrast Lowrance v. Coughlin*, 862 F.Supp. 1090, 1099 (S.D.N.Y.1994) (stating that the Southern District of New York has recognized a constitutional right to accurate information in a parole file).

It is our view that the procedural Due Process protections created in *Monroe* and *Paine* are in essence inconsistent with subsequent precedent in their respective circuits and that both cases have thus been effectively overruled. Whatever the viability of these anomalous cases today, our precedent is definite and precise on this point: in the absence of a cognizable liberty interest, a state prisoner cannot challenge parole procedures under the Due Process Clause.

[14] This holding is not a departure from our prior view in *Johnson I*, 821 F.2d at 1122-1123. There we found only that Johnson *perhaps* could state a cause of action because his allegations concerned protest letters being used as a pretext for discriminatory treatment of the sub-class of writ writers among the prison population. *See id.* at 1122 (characterizing Johnson's claims respecting "use of protest letters in parole determinations" as arguably including assertions "that *writ writers* are . . . denied equal protection in this manner" and "that use of such letters infringes on writ writers' freedom of speech"; emphasis added). Indeed, this Court expressly disfavored the result obtained below:

therefore reverse the magistrate judge's contrary ruling and order that on remand the protest letters claim be dismissed with prejudice.

III. Writ-Writing

A. The Issue

Johnson is a "writ writer," which is generally understood to mean a prisoner who files lawsuits, and/or assists other prisoners in the preparation or prosecution of lawsuits, usually against prison (or sometimes jail) authorities and including conditions of confinement and

---

> "In an effort to support the district court's judgment regarding the Parole Board's 'discretionary' use of protest letters on grounds not stated by that court, the defendants suggest that Johnson has failed to allege sufficient facts to state a claim. Noting that the fourteenth amendment guarantees 'equal laws, not equal results,' they argue that a rule permitting such discretion, if applied evenly, presents no constitutional problem. We agree, but note that Johnson's allegations do raise suggestions of invidious, group-based discrimination and infringement of fundamental rights." *Id.* at 1122-23 (footnote omitted).

Moreover, we expressly reserved judgment, stating: "We intimate, of course, no opinion concerning the possibility of his *stating a claim* for which relief might be granted, *or*, if he does, the merits of that claim." *Id.* at 1123. (Emphasis added).

Because the *Johnson I* court's remand depended upon assumptions concerning the identity of the group being discriminated against which are inapposite to the findings below, and because *Johnson I* in any event expressly reserved judgment as to whether a claim could even be stated, that opinion is not inconsistent with our holdings today.

habeas cases and suits against law enforcement and court personnel. Johnson claims that many parole files contain some record of or reference to a prisoner's litigation activities, and that this information is considered by parole panels. Johnson contends that this information is viewed negatively by the Board and that many prisoners are denied parole at least in part due to their litigiousness. Johnson contends that the Board is in fact retaliating against him and the other prisoners who avail themselves of their constitutional right of access to the courts. Furthermore, insofar as this practice discriminates against "writ writers" in the general prison population, he contends that it constitutes a violation of the Equal Protection Clause.

B. The Magistrate Judge's Ruling

Reviewing the evidence, the magistrate judge found that writ writing activities were often discussed in parole interviews and that documentation of these activities often appeared in parole files. *Johnson II*, 910 F.Supp. at 1214. The magistrate judge also found that prisoners were entitled to assist other prisoners in preparing writs and other legal documents. *Id.* at 1213. After noting that "historically there has been a bias against inmates considered to be writ writers" by the TDCJ-ID, the magistrate judge concluded that this bias "restricts, at least as a practical matter, an inmate's access to the courts." *Johnson II*, 910 F.Supp. at 1212. He likewise opined that "*[a]ny distinction made between inmates who seek access to the courts and those who do not violates the equal protection clause.*" *Id.* at 1213 (emphasis added). Later in his opinion the magistrate judge clarified his findings of injury, stating that "this

perception of retaliation has chilled, at least to some extent, inmates' exercise of their constitutionally protected right of access to the courts." *Id.* at 1215 (footnote omitted).

The magistrate judge ordered the Board to adopt by rule a policy "that prohibits consideration of inmates' exercise of the constitutionally protected right of access to the courts" and "shall specify that such activity is wholly irrelevant to the parole decision making process." *Johnson II*, 910 F.Supp. at 1215. He further required that this rule "shall establish specific, enforceable sanctions for all violations" thereof. *Id.* In addition, the order required that "[a]ll existing [inmate] files be reviewed for and purged of *any and all documentation related to an inmates' litigation activity* as the specific inmate becomes eligible for [parole] review. Only upon written request of an inmate shall *any litigation material or information* be included or retained in his or her parole file." *Id.*(emphasis added).

C. Analysis

1. The Retaliation Theory

The elements of a claim under a retaliation theory are the plaintiff's invocation of "a specific constitutional right," the defendant's intent to retaliate against the plaintiff for his or her exercise of that right, a retaliatory adverse act, and causation, *i.e.*, "but for the retaliatory motive the complained of incident . . . would not have occurred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir.1995) (*citations omitted*), *cert. denied*, ___ U.S. ___, 116 S.Ct. 800, 133 L.Ed.2d 747 (1996). In this case, Johnson

must prove that he and other prisoners engaged in constitutionally protected litigation activity, were denied parole, and that such action was taken "in an effort to chill [prisoners'] access to the courts or to punish them for having brought suit." *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1296 (5th Cir.), *cert. denied*, 513 U.S. 926, 115 S.Ct. 312, 130 L.Ed.2d 275 (1994). *See also Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112, 1114 (5th Cir.1987). The relevant showing in such cases must be more than the prisoner's "personal belief that he is the victim of retaliation." *Edwards*, 51 F.3d at 580.

It has long been recognized that prisoners generally enjoy a constitutional right of access to the courts. *See Johnson v. Avery*, 393 U.S. 483, 483-485, 89 S.Ct. 747, 748, 21 L.Ed.2d 718 (1969); *Ex parte Hull*, 312 U.S. 546, 547-549, 61 S.Ct. 640, 641, 85 L.Ed. 1034 (1941). This right of access for prisoners is not unlimited, however; rather, it encompasses only "a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement." *Lewis v. Casey*, ___ U.S. ___, ___, 116 S.Ct. 2174, 2182, 135 L.Ed.2d 606 (1996). Furthermore, we held in *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir.1996), that "[p]risoners have no right to a particular prisoner's help in legal matters as long as the putative recipient's constitutional right of access to the courts is not infringed." The relevant constitutional protection in this instance accrues to the benefit of the prisoner in whose name the lawsuit is filed, not those who assist in the preparation of that lawsuit.[15] *See Lewis*, ___ U.S. at

---

[15] The magistrate judge relied upon the Supreme Court's pronouncements in *Johnson*, 393 U.S. at 483-489, 89 S.Ct. at

___, 116 S.Ct. at 2184 ("the Constitution does not require that prisoners . . . be able to conduct generalized research, but only that they be able to present their grievances to the courts"). Thus, neither any frivolous filings nor secondary litigation activity, *i.e.*, legal research and writing that does not involve preparation of lawsuits challenging a writ writer's own conviction(s) or the conditions of his or her confinement, may comprise the basis of a retaliation claim. Conversely, a parole panel's consideration of such unprotected activity in denying a prisoner parole does not infringe that prisoner's constitutional right of access to the courts. *Id.* at ___, 116 S.Ct. at 2182 ("[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration"). The magistrate

---

748-750, and *Wolff v. McDonnell*, 418 U.S. 539, 578-580, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935 (1974), in concluding that the state could not retaliate against prisoners who assist other prisoners in preparing lawsuits. As the Supreme Court's decision in *Lewis* and our *Tighe* opinion make clear, however, while the assistance of other prisoners may be one way in which a particular prisoner's right of constitutional access to the courts is vindicated, such is not in and of itself a constitutional right. If State regulation or proscription of "writ writing" endangers a prisoner's ability to file lawsuits protected under *Lewis*, then it is that particular prisoner's constitutional rights which have been violated. While jailhouse lawyers may (or may not) present an inexpensive and relatively burdenless means of respecting other prisoners' rights of access to the courts, the particular means by which Texas prisoners' constitutional rights are to be vindicated is left as a primary matter to the proper Texas authorities, and federal courts should not intrude until "some inmate [can] demonstrate that a nonfrivolous legal claim ha[s] been frustrated or . . . impeded." *Lewis*, ___ U.S. at ___, 116 S.Ct. at 2181.

judge did not have the benefit of either *Lewis* or *Tighe*, and, of course, is not to be faulted for failing to address them.

In concluding that the prisoners' constitutional right of access to the courts had been violated, the magistrate judge plainly considered, and proceeded throughout on the assumption, that *any and all* prisoner writ writing or litigation activity was constitutionally protected. At no point did he ever distinguish between frivolous filings and secondary litigation activity on the one hand and protected filings of at least arguable merit on the other.[16] Almost all of the prisoners who testified alluded to participation in numerous lawsuits.[17] In the absence of

---

[16] We note that, with the exception of pauper petitions under 28 U.S.C. § 1915(d) and the imposition of certain sanctions, express findings of frivolity are typically not required before a case is summarily dismissed. Moreover, a lawsuit which does not appear frivolous on the face of the pleadings may turn out to be (and have been) so when the pleadings are pierced at a preliminary hearing, discovery, summary judgment, or trial. Because it is the prisoner who bears the burden of proving a constitutional violation it is the prisoner who must demonstrate the protected character, including non-frivolity, of prior lawsuits in which he was involved.

[17] Although there is record evidence concerning the persistent litigiousness of the named class representative, Daniel Johnson, there is no evidence of record concerning the scope or results of his litigation activities. *See, however, Johnson v. Kegans*, 870 F.2d 992 (5th Cir.1989) (section 1983 action filed by Johnson dismissed as frivolous); *Holmes v. Hardy*, 852 F.2d 151 (5th Cir.1988) (section 1983 action brought by Johnson and other prisoners dismissed as frivolous); *Whittington v. Lynaugh*, 842 F.2d 818 (5th Cir.1988) (section 1983 action brought by Johnson and another prisoner dismissed as frivolous with sanctions); *Johnson v. Onion*, 761 F.2d 224 (5th Cir.1985) (section 1983 action

detailed information regarding the named parties, subject matter, arguable merit, and disposition of those lawsuits, however, there is no way to determine the extent to which the prisoners' constitutional rights of access to the courts, as defined by *Lewis* and *Tighe*, are implicated. Furthermore, when a prisoner's litigation history includes both protected and unprotected activity, if a parole panel's adverse action is attributable to unprotected activity and would have occurred on that basis regardless of the exercise of protected rights, the claim fails on the element of causation, *i.e.*, the requirement that "but for" the state's motive to retaliate against the prisoner for the exercise of his constitutional rights

---

filed by Johnson dismissed due to failure to present a case or controversy). Among the other prisoners who testified, Terrence Spellmon stated that he has filed fifteen lawsuits since being incarcerated. Mark Fields testified that he has filed "about 200" lawsuits, only six to eight of those being suits in which he is the named plaintiff. Robert Delgado testified that he has filed "about twelve lawsuits" since being incarcerated. Thomas Baranowski, although he did not give a total number of prior lawsuits filed, alluded to at least four separate lawsuits he has filed in his own behalf. George Hall testified that he had filed "quite a few [lawsuits] against Hutchinson County." Kenneth Thompson, Jr., testified that he has filed a "considerable amount of litigation" against Texas prison officials on his own and other prisoners' behalf. There is no finding or evidence indicating even approximately what portion of prisoner writ writing is constitutionally protected under the standards of *Lewis* and *Tighe*.

From our appellate review over the years of very large numbers of Texas prisoner suits, we know that a great many – perhaps the overwhelming majority or even almost all – of them have been without arguable merit.

parole would not have been denied.[18] *See Enplanar, Inc.*, 11 F.3d at 1297.

While the magistrate judge's use of an improper and overly inclusive legal standard (viewing any and all writ writing as constitutionally protected) alone requires reversal, we also note other inadequacies in the findings on which the judgment below depends. Because this is an official capacity lawsuit, it is a condition precedent to liability under section 1983 that the challenged conduct of the individual Board members be tied to an official Board custom or policy, formal or informal. *Kentucky v. Graham*, 473 U.S. 159, 165-167, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985); *Polk County v. Dodson*, 454 U.S. 312, 325-327, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981). While the magistrate judge did observe that "writ writing activities are frequently discussed in parole interviews and that documentation of such activities frequently appears in inmates' parole files," *Johnson II*, 910 F.Supp. at 1214, he made no finding that these actions were sufficiently widespread and approved to represent the implementation of an official formal or informal custom or policy of the Board. *See Ruiz v. Estelle*, 679 F.2d 1115, 1154 (5th Cir.1982) (*citation omitted*) ("systemwide injunctive relief may not be predicated on individual misconduct that 'is not part of a pattern of persistent and deliberate official policy' "), *opinion amended in part and vacated in part*, 688

---

[18] When a substantial amount of a writ writer's time is devoted to litigation-related activity which is unprotected, generalized references in the parole file or during parole interviews to "litigiousness" will usually be insufficient to prove that the state has retaliated against the prisoner for his or her exercise of a constitutional right.

F.2d 266 (5th Cir.1982), *cert. denied* 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). In the absence of this threshold finding, the imposition of liability, under either a retaliation or an equal protection theory, was premature.

Furthermore, while we do not directly address the sufficiency of the evidence to support the magistrate judge's finding that there has historically been a bias against writ writers by employees of the Texas *prison* system, we nonetheless express concern over the magistrate judge's reliance, both expressly and through apparent reliance on witness testimony, upon findings associated with the hallmark Texas prison litigation case of *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D.Tex.1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir.1982), *opinion amended in part and vacated in part*, 688 F.2d 266 (5th Cir.1982), *cert. denied* 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). *Johnson II*, 910 F.Supp. at 1212 n. 12. The findings involved in that case were made more than a decade and a half ago and involved the day-to-day administration of penal institutions run by the predecessor of the TDCJ-ID, *not the parole system which is the object of this litigation.* Findings that in the past (or present), employees of other state departments or agencies have exhibited a bias against writ writers do not support a conclusion that the defendants in this case, members of the Board, have acted and continue to act with retaliatory animus in denying prisoners parole. The findings of the *Ruiz* court are generally inapposite and of only the most marginal relevance to the current litigation.

In addition, we hold that the magistrate judge's findings of causation are inadequate because the mere *consideration* of litigation activities, even if such activities are

protected under *Lewis* and *Tighe*, does not in and of itself make out Johnson's retaliation claim. *Johnson II*, 910 F.Supp. at 1215-1216 n. 17. There must be a finding, adequately supported by the evidence, that pursuant to an established policy or custom (formal or informal), the Board retaliated against writ writers for engaging in protected activity *by* withholding parole. The causative component of this claim is an adequately supported finding that the Board's policy or custom actually played a part in its denial of parole to Johnson (and other writ writers) and that but for the Board's policy or custom Johnson (and other writ writers) would not have been denied parole.[19] Nowhere, however, does the opinion below make any such determination. Rather, the magistrate

---

[19] In this regard, the dearth of statistical or other evidence showing the relative parole rates of writ writers versus the general prison population is damaging to Johnson's case. While the absence of this evidence is not necessarily fatal to the retaliation theory, it does diminish Johnson's chances of proving causation.

We are not unmindful that "[a]n action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate." *Woods*, 60 F.3d at 1165. The situation of pretext, however, concerns the existence of retaliatory motivation, not causation. Unless the complained-of action would not have taken place "but for" the retaliatory animus, then the retaliation claim has not been made out. *Id.* at 1166. Moreover, there must be a *finding* that retaliation was actually a "but for" cause of the complained of action (denial of parole). *Cf. St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (in claim for discriminatory discharge, there must be finding that discharge would not have occurred but for discriminatory animus, not merely that employer's stated nondiscriminatory reasons were pretextual).

judge's opinion merely makes several references to instances where litigation activities appeared in parole files or were raised in interviews, and discusses the prisoners' perception of a linkage between parole denial and prisoner litigiousness. There is *no finding* whatever that adverse consideration of writ writing by the Board actually played a part in its denial of parole to *any* particular inmate (or any identified group of inmates). The absence of such a finding is especially significant given the background of Johnson and the other testifying prisoners, which raises substantial doubt as to whether this record would adequately support such a finding.[20]

Finally, we regard the evidence cited by the magistrate judge to demonstrate the "chilling" of protected rights system-wide as inadequate. In support of his finding, the magistrate judge noted only the testimony of two witnesses: the first, a single prisoner who once refused to receive legal mail because of his own, self-generated personal belief that this would improve his chances of obtaining parole; the second, a staff attorney for the 14th

---

[20] Johnson was convicted of aggravated rape, involving the use of a knife, and began a sentence of lifetime imprisonment on April 26, 1977. When his conviction was affirmed on appeal, five other pending indictments for rape were dismissed. Johnson's criminal history includes half-a-dozen prior arrests, and he has escaped from several jails and prisons in both Texas and Illinois. The bulk of the other prisoners who testified similarly face a long period of incarceration for violent offenses, typically murder and/or some variety of sexual assault, and have extensive criminal histories. There is no substantial evidence that similarly situated prisoners with comparable (or worse) records, but who were *not* writ writers, were granted parole in the same general time frame that these prisoners were denied it.

District Court of Appeals in Houston, Texas, who related double hearsay statements purportedly originating from unidentified prisoners regarding their having "dismissed appeals of their own convictions," supposedly for parole-related reasons.[21] *Johnson II*, 910 F.Supp. at 1215 n. 19. The

---

[21] The only fair reading of this testimony is that it relates solely to direct appeals of conviction. The staff counsel testified that "from the mail of the criminal appellants themselves" and from "personal conversations with some criminal defense attorneys" she was informed that appeals were withdrawn "because they felt they would not be considered for parole." She also said "I think some would say they couldn't get it [parole]; others would say they wouldn't be considered." She testified that in the court she worked for "about 55 to 60 percent of our appeals each year are criminal. That's about 750, 800 appeals, all criminal." Although she had been with the court some eight-and-a-half years, she began noticing the dismissal of appeals only about three years before her testimony. She further stated that over the last two years "to make an estimate" she would say "about twenty" appeals – which would be less than 1.5 percent of the total – had been thus withdrawn. This witness gave no specifics: no names or descriptions of any particular cases, appellants, or defense counsel; no copy or extract from any pleading or correspondence; no particular words quoted or even paraphrased; no record or log, formal or otherwise, of dismissed appeals; and nothing to suggest that any of these some twenty appeals had (or were believed by anybody to have had) any arguable merit. There was no corroboration for her testimony. She admitted she had no knowledge whatever as to whether appeal precluded parole consideration or had any adverse effect on it, but was only testifying as to "the perception conveyed to" her by appellants and their attorneys. The witness did not recount any reason given her for the asserted beliefs of any of these some twenty appellants or their attorneys.

There is no evidence or finding that direct appeal of one's own conviction was regarded by anybody as "writ writing." Johnson in his brief states that "[t]he term writ writer refers to

magistrate judge's conclusion of constitutional injury relies exclusively upon testimony concerning the subjective appraisal of prisoners, with little or nothing in the way of objective evidence of actual injury.[22] *See United*

---

inmates who file or assist others in filing law suits, including writs of habeas corpus and attacks on conditions of confinement, seeking injunctive relief or monetary damages." There is no evidence as to whether or not the Board had any policy or practice to *postpone* either consideration of parole or the gathering of information for parole consideration purposes *until* the conviction resulting in the incarceration from which the inmate might be paroled became final on direct appeal. We observe that prisoners whose sentences are ten years or less remain in local custody pending completion of direct appeal unless they request or consent to transfer to TDCJ-ID. *See* Tex.Code Crim. Proc. Art. 42.09 sec. 4; *Ex Parte Rodriguez*, 597 S.W.2d 771 (Tex.Crim.App.1980). There is absolutely no evidence that the Board had any policy or practice to deny parole to an inmate once his conviction became final on appeal in whole or in part because the conviction had been appealed (or that whether the conviction was appealed was ever noted or discussed in the parole process).

In sum, the testimony of the staff attorney is essentially irrelevant. Moreover, it is far too attenuated and weak – speaking at most to her conclusory impression of why less than 1.5 percent of *criminal direct appeals* were voluntarily dismissed in a two-year period – to support any finding of a general chilling effect respecting writ writing.

[22] Johnson presented no evidence of reduced filings or filings below what would be normally expected. We observe that in the twelve months ending June 30, 1985, a total of 2,127 suits were filed by Texas prisoners in *federal* district court in Texas. In the twelve months ending June 30, 1990, the total was 2,457; in the twelve months ending September 30, 1995, it had reached 5,547. Annual Report of the Director of the Administrative Office of the U.S. Courts, 1985, 1990, 1995. It is hard to see that there has been any "chilling."

States v. Ramsey, 431 U.S. 606, 622-624, 97 S.Ct. 1972, 1982, 52 L.Ed.2d 617 (1977) (to state actionable retaliation claim any "chill" of protected rights must be more than "minimal" and not "wholly subjective"). Moreover, the findings and evidence do not identify and address in this connection writ writing which is protectable under *Lewis* and *Tighe*, as distinguished from other writ writing. There is no evidence of any specific writ writing activity protectable under *Lewis* and *Tighe* which was actually foregone because of this purported "chill." The evidence discussed does not address any "chill" of the constitutionally protected right of access to the courts actually suffered by Johnson, the class representative, and is in any case insufficient to independently justify systemwide relief. *Lewis*, ___ U.S. at ___-___, 116 S.Ct. at 2183-2184.

In sum, we conclude that due to the application of an improper legal standard concerning the extent to which the right of access to the courts protects particular litigation activities of prisoners, the judgment finding merit in Johnson's retaliation claim must be reversed and remanded for further consideration. On remand, findings must be made regarding the extent to which Johnson, the only named plaintiff, has engaged in constitutionally protected litigation activities and whether a Board custom or policy (formal or informal) authorizing or endorsing punitive retaliation for that protected activity *actually* played a part in its denial of his parole.[23] And, if he

---

[23] To order relief, whether under a retaliation theory or an equal protection theory, the magistrate judge must conclude in this connection, on the basis of adequate evidence, that consideration of protected litigation activities by individual

would have been denied parole notwithstanding such consideration, an actionable claim is not established. On the basis of these findings, the trial court should determine whether Johnson has suffered any injury which gives him standing to pursue relief in his capacity as class representative. *Lewis*, ___ U.S. at ___, 116 S.Ct. at 2183; *Arlington Heights*, 429 U.S. at 262-266, 97 S.Ct. at 562-563; *Warth v. Seldin*, 422 U.S. 490, 502-503, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1975).

If Johnson is found to have suffered redressable injury in his capacity as class representative, particularized findings will also be needed regarding the nature and scope of the litigation activities and constitutionally cognizable injuries, if any, suffered by contemporary class members. Any conclusion that there is an actionable class injury sufficiently widespread to warrant systemic relief, whether under a retaliation theory or an equal protection theory, must rest on substantially more than the historical findings of other courts, such as the *Ruiz* court, and the subjective perceptions of class members. *Lewis*, ___ U.S. at ___, 116 S.Ct. at 2184. Finally, any relief ordered under any theory is to be narrowly confined to remediation of any proven constitutional violation; no ordered relief may prohibit the Board's consideration of frivolous lawsuits or other nonprotected litigation activities in making parole determinations.

Board members was undertaken pursuant to an established, albeit possibly unwritten or unofficial, custom or policy of the Board.

2. The Equal Protection Theory

The generally applicable legal standards are noted in our discussion under subpart II(C), *supra*. And, much of what we have said regarding the writ writer retaliation theory is likewise applicable to the writ writer equal protection theory, including the fact, fatal to the judgment below, that the magistrate judge proceeded on the erroneous assumption that any and all writ writing was constitutionally protected. We assume, *arguendo*, that a viable sub-class of the prison population – i.e. those who engage in constitutionally protected writ writing – may be shown.[24] To properly prove his claim under this theory, Johnson had to show that because of his constitutionally protected writ writing "he was treated unfairly compared to other prisoners who were [otherwise] similarly situated." *Hilliard v. Board of Pardons and Paroles*, 759 F.2d 1190, 1193 (5th Cir.1985) (citation omitted). The magistrate judge stated that "[a]ny distinction made between inmates who seek access to the courts and those who do not violates the equal protection clause." *Johnson II*, 910 F.Supp. at 1213.

However, the magistrate judge made no finding that in the case of Johnson, or of any other specific inmate, adverse consideration by the Board of his writ writing – much less his constitutionally protected writ writing – actually played a part in its denial of parole to him. Nor does the evidence show this. Further, no findings were

---

[24] The class certified, however, was all present and future inmates of TDCJ-ID, not writ writers, much less those engaged in constitutionally protected writ writing.

made respecting the treatment meted out by the Board to comparable segments of the nonlitigious prison population, and the record does not provide an adequate basis for any such finding. There is no statistical or similar evidence whatever in the record comparing the parole rates of litigious and nonlitigious prisoners, let alone a comparison of those who engage in *constitutionally* protected writ writing and those who do not. Even were Johnson able to show that the Board had a largely negative view of writ writing in general, he does not appear to have demonstrated any actual "disparate" impact upon any "class" of those engaging in constitutionally protected writ writing. *McCleskey*, 481 U.S. at 292-293, 107 S.Ct. at 1767 (part of Equal Protection challenge is proof that "purposeful discrimination 'had a discriminatory effect' "), *quoting Wayte v. United States*, 470 U.S. 598, 608-609, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985).

We further note that although litigation related activity tangentially defines the parameters of the allegedly aggrieved class, the practice actually challenged directly affects only parole consideration and not a prisoner's ability to file a lawsuit or assist another in doing so. *Compare Lyng v. Castillo*, 477 U.S. 635, 637-642, 106 S.Ct. 2727, 2729-2731, 91 L.Ed.2d 527 (1986); *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2522, 135 L.Ed.2d 1047 (1996); *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 403-404 (5th Cir.1984), *cert. denied*, 469 U.S. 1159, 105 S.Ct. 908, 83 L.Ed.2d 922 (1985). And, not all prisoner litigation activity is protected. *Lewis; Tighe.* Thus, any burden which customary consideration in the parole process of litigation activity generally may impose upon a "fundamental right" is "incidental"

and does not warrant strict scrutiny under an equal protection analysis. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 872-874, 112 S.Ct. 2791, 2818-2819 (1992); *Younger v. Harris*, 401 U.S. 37, 49-52, 91 S.Ct. 746, 753-754, 27 L.Ed.2d 669 (1971). Hence, for equal protection purposes only a conceivable rational relationship is required. *Stern*, 778 F.2d at 1054. It is simply not irrational to consider general litigiousness, or the filing (or aiding in the filing or the fomenting) of frivolous law suits, or concentration on being a "jail house lawyer," or the like, as anti-social activity which may to some extent interfere with and adversely reflect on a prisoner's rehabilitation.[25] If in a rare, given instance such a general approach happens to result in the Board's adverse consideration of a given inmate's *constitutionally* protected writ writing activity having *actually* played a part in its denial of

---

[25] *Cf., e.g.*, Justice Powell's observations in *Schneckloth v. Bustamonte*, 412 U.S. 218, 260-262, 93 S.Ct. 2041, 2065, 36 L.Ed.2d 854 (1973) (Powell, J., concurring, joined by the Chief Justice and Justice Rehnquist):

> "At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." (Footnote omitted).

Justice Blackmun stated that he agreed "with nearly all that Mr. Justice Powell has to say in his detailed and persuasive concurring opinion." *Id.* at 249, 93 S.Ct. at 2059. This portion of Justice Powell's *Schneckloth* concurrence was cited with approval in *Kuhlmann v. Wilson*, 477 U.S. 436, 451-453, 106 S.Ct. 2616, 2626, 91 L.Ed.2d 364 (1986).

parole to that particular inmate,[26] then that may be addressed and redressed under standards essentially comparable to those applicable to the retaliation theory.

We accordingly reverse and remand the magistrate judge's ruling on the "writ writer" claim.

IV. The Attorneys' Fee Award

Because the magistrate judge's judgment has been reversed, Johnson can no longer be considered a "prevailing party" entitled to attorneys' fees. 42 U.S.C. § 1988. The award of attorneys' fees is accordingly vacated.

Conclusion

The magistrate judge's ruling on the protest letter claim is reversed and on remand that claim shall be dismissed with prejudice. The magistrate judge's judgment on the writ writer claim is reversed and remanded for reconsideration and/or further proceedings in accordance herewith. The magistrate judge's award of attorney's fees is vacated.

REVERSED in PART; VACATED in PART; and REMANDED.

---

[26] There is no finding and no evidence tending to indicate even approximately what portion of prisoner writ writing is constitutionally protected. Our experience would suggest that it is extremely small. *See* note 17, *supra*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50879 & 96-50382

DANIEL JOHNSON, Individually and on Behalf of All Present and Future Inmates of the Texas Department of Criminal Justice – Institutional Division

Plaintiff-Appellee

v.

VICTOR RODRIGUEZ, in his Official Capacity as Chairman, Texas Board of Pardons and Paroles, all Present and Future Members of the Texas Board of Pardons and Paroles in their Official Capacities; ALLAN B POLUNSKY, in his Official Capacity as Chairman, Texas Board of Criminal Justice, and all Present and Future Members of the Texas Board of Criminal Justice in their Official Capacities

Defendants-Appellants

Appeals from the United States District Court for the Western District of Texas, Austin

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion April 23, 1997, 5 Cir. F.3d)

(Filed Jun. 2, 1997)

Before GARWOOD, DAVIS and STEWART, Circuit Judges.

PER CURIAM:

(✔) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge